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No. 05-1519

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In the Supreme Court of the United States

ARACELY ZAMORA-GARCIA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner suffered a deprivation of rights under the Due Process Clause when her request for discretionary relief from removal was deemed abandoned because petitioner's representative had not filed necessary documents in a timely fashion, and the Board of Immigration Appeals concluded that petitioner would have had little likelihood of success in light of her conviction for helping two aliens to enter this country illegally.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the *Federal Reporter* but is *reprinted in* 161 Fed. Appx. 397. The opinion of the Board of Immigration Appeals (Pet. App. 3) is unreported. The decision of the immigration judge (Pet. App. 4-6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2006. A petition for rehearing was denied on March 2, 2006 (Pet. App. 17-18). The petition for a writ of certiorari was filed on May 26, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Alien smuggling—the act of assisting another person to enter the United States in violation of the immigration laws—is a criminal offense. See 8 U.S.C. 1324(a) (2000 & Supp. IV 2004). In addition, "[a]ny alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable." 8 U.S.C. 1227(a)(1)(E)(i). An alien who engages in such conduct also cannot be regarded as a "person of good moral character" for purposes of the immigration laws. See 8 U.S.C. 1101(f)(3) (2000 & Supp. IV 2004); 8 U.S.C. 1182(a)(6)(E).

Petitioner is a native of Mexico who obtained lawful permanent resident status in 1982. Pet. App. 4. She is a migrant farm worker whose "home base" is in the Rio Grande Valley in Texas. A.R. 53. Before the events that gave rise to this case, she traveled to Mexico approximately once a month. See Pet. App. 33.

At approximately 6 a.m. on February 10, 2000, petitioner was apprehended by border patrol agents at the Harlingen, Texas, airport, as she tried to obtain boarding passes for herself and two minor Mexican nationals for a flight to Indiana. Pet. App. 48-49. Petitioner initially claimed that the minors were her daughters. *Id.* at 49. After the girls stated that their mother was in Indiana, however, petitioner claimed that she was the girls' aunt and produced a United States citizen birth certificate, which she claimed was the older child's. *Id.* at 49-50.

A subsequent investigation revealed that the children had been driven from Cuernavaca, south of Mexico City, to Reynosa, Mexico, and had met petitioner at that location. Petitioner escorted the girls through the port of entry by showing her lawful-permanent-resident identification card. When questioned by immigration officials, petitioner first claimed that the older child had furnished the birth certificate; she then stated that the children's mother had given it to her; and she finally admitted that it belonged to her own cousin. Petitioner also stated that she was given $1000 for the trip. The children were turned over to the Mexican Consulate in Brownsville, Texas, and petitioner was referred for criminal prosecution and for removal proceedings. Petitioner later pleaded guilty to aiding and abetting aliens to elude examination by immigration inspectors, in violation of 8 U.S.C. 1325 and 18 U.S.C. 2. A.R. 231; Pet. App. 40.

2. Petitioner's removal proceeding commenced on March 30, 2000. A.R. 247. Petitioner obtained representation by a non-attorney accredited representative. A.R. 181, 242; see Pet. App. 7. Petitioner conceded that she was subject to removal based on her alien-smuggling offense, see *id.* at 4-5; A.R. 183, and she indicated that she would apply for cancellation of her removal under 8 U.S.C. 1229b(a), see Pet. App. 5; A.R. 184.[1]

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[1] Section 1229b(a) provides:

> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—(1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony.

On April 11, 2001, the immigration judge (IJ) scheduled a hearing on the request for discretionary relief for September 20, 2001. See A.R. 180, 185. The IJ informed petitioner that she was required to provide her fingerprints by April 30, 2001, and the application and supporting documents by September 4, 2001. See Pet. App. 5; A.R. 185. The IJ stated to petitioner: "You need to make sure that you cooperate fully with [your representative] because if you do not meet these deadlines, I will consider your application abandoned. I will not accept it late and I will order you deported." A.R. 186. Petitioner replied: "Okay." *Ibid.*

The IJ did not receive petitioner's application until September 17, 2001. See Pet. App. 5, 10. When the hearing reconvened on September 20, 2001, petitioner's representative acknowledged that the application and documents had been submitted after the deadline, and he stated that he had not been able to review the application with petitioner because she had moved and he was not able to talk with her when she called his office. *Id.* at 10. The IJ deemed the application abandoned, denied it on that basis, and ordered that petitioner be removed to Mexico. See *id.* at 6, 12.

3. Petitioner appealed the IJ's decision to the Board of Immigration Appeals (BIA or Board). Petitioner contended that the IJ had erred in ordering her removal, and that the IJ instead should have granted a continuance and referred petitioner's accredited representative for disciplinary proceedings. A.R. 59-61. In the alterna-

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8 U.S.C. 1229b(a). During the hearing, the Department of Homeland Security did not dispute that petitioner satisfied those eligibility requirements, but neither the immigration judge nor the Board of Immigration Appeals made any findings relating to petitioner's eligibility.

tive, petitioner contended that she had established the elements of an ineffective-assistance claim under *Matter of Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988), and that her case should therefore be remanded for a hearing on the merits of her request for cancellation of removal. A.R. 61-62. Petitioner stated that, in light of the equitable factors weighing in her favor, it was "highly likely that she would have earned discretionary relief [if she had been] given a hearing on the merits." A.R. 62.

On March 24, 2004, the BIA dismissed petitioner's appeal. Pet. App. 3. The Board noted petitioner's conviction for alien smuggling, and it observed that petitioner "presented no significant evidence that her equities outweigh this offense." *Ibid.* The BIA concluded that there was "little likelihood of success should the appeal be sustained," and it therefore dismissed the appeal. *Ibid.*

4. The court of appeals denied a petition for review. Pet. App. 1-2. The court rejected petitioner's contention that "the BIA and IJ had a duty to protect her from the alleged ineffectiveness of her accredited representative," finding the claim to be unsupported by any authority. *Id.* at 2. The court further held that, "[b]ecause [petitioner's] claim did not implicate the violation of a due process right, the BIA did not err in denying her claim for lack of prejudice." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. Under established BIA precedent, a decision whether to grant or deny relief in the exercise of discre-

tion is made by balancing positive and negative factors bearing on the applicant's suitability for permanent residence in the United States. See, *e.g.*, *In re C-V-T-*, 22 I. & N. Dec. 7, 11-12 (B.I.A. 1998). The Board has also long held that, in order to obtain reopening of administrative proceedings or similar relief on the ground of ineffective assistance, an alien must demonstrate that he was prejudiced by his representative's substandard performance. See, *e.g.*, *Lozada*, 19 I. & N. at 640. Petitioner does not challenge the Board's authority to require a showing of prejudice in this setting, and any such challenge would be implausible. Even a defendant in a criminal trial, who is constitutionally entitled to the effective assistance of counsel, must demonstrate prejudice in order to obtain relief on an ineffective-assistance claim. See *Strickland* v. *Washington*, 466 U.S. 668, 693 (1984) (holding that, with limited exceptions, "actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice").

In the instant case, the BIA found that petitioner had "presented no significant evidence that her equities outweigh" her alien-smuggling offense. Pet. App. 3. For that reason, the Board concluded, petitioner "ha[d] not established that she was prejudiced by" the allegedly deficient representation because there was "little likelihood" that petitioner could ultimately succeed in her request for discretionary relief. *Ibid.* Even if petitioner could establish a constitutional right to effective assistance in connection with her application for cancellation of removal, there would be no basis for setting aside the BIA's decision in this case unless the Board's no-prejudice finding is overturned. Petitioner does not challenge that finding, however, and the BIA's assessment of the

competing equities in this case raises no issue warranting review by this Court, if that assessment is subject to judicial review at all.[2]

2. As the court of appeals correctly stated, petitioner's claim of ineffective assistance "did not implicate the violation of a due process right." Pet. App. 2. The ineffectiveness of a litigant's attorney cannot be the basis of a constitutional claim unless the litigant has a constitutional right to appointed counsel. See *Coleman* v. *Thompson*, 501 U.S. 722, 752 (1991) (holding that, because "[t]here is no constitutional right to an attorney in state post-conviction proceedings * * * , a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings"); *Wainwright* v. *Torna*, 455 U.S. 586, 587-588 (1982) (per curiam) ("Since respondent had no constitutional right to counsel [in a discretionary state appeal], he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely.").

Congress has provided that an alien in removal proceedings "shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings." 8 U.S.C. 1229a(b)(4)(A). Section 1229a(b)(4)(A) reflects Congress's understanding that

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[2] A discretionary "judgment regarding the granting of relief under" 8 U.S.C. 1229b is not subject to judicial review. 8 U.S.C. 1252(a)(2)(B)(i). That preclusion rule does not foreclose review of any "constitutional claims or questions of law." See REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 106, 119 Stat. 310 (to be codified at 8 U.S.C. 1252(a)(2)(D)). The Board's assessment of the competing equities in this case implicates no constitutional or other legal question, but instead appears to reflect the sort of discretionary judgment that is unreviewable under Section 1252(a)(2)(B)(i).

aliens in those proceedings have no constitutional right to appointed counsel, and petitioner does not contend that her due process rights were violated by the government's failure to provide her an attorney. Thus, while the BIA has chosen to treat ineffective assistance of counsel as a ground for reopening prior administrative decisions under specified circumstances, that practice is not mandated by the Constitution. Although some courts of appeals have concluded that there is a due process right to effective assistance of counsel in removal proceedings, see, *e.g.*, *Dearinger ex rel. Volkova* v. *Reno*, 232 F.3d 1042, 1045-1046 (9th Cir. 2000), that conclusion is incorrect.[3]

The Court in *Torna* explained that the litigant in that case

> was not denied due process of law by the fact that counsel deprived him of his right to petition the Florida Supreme Court for review. Such deprivation—even if implicating a due process interest—was caused by his counsel, and not by the State. Certainly, the actions of the Florida Supreme Court in dismissing an application for review that was not filed timely did not deprive [the litigant] of due process of law.

455 U.S. at 588 n.4; see *Coleman*, 501 U.S. at 753 (holding that, in a context where a litigant has no constitutional right to appointed counsel, "the attorney is the [litigant's] agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear

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[3] The BIA, consistent with its usual practice of following circuit precedent, declined to find no due process right to effective assistance of counsel in *In re Assaad*, 23 I. & N. Dec. 553, 557-560 (2003).

the risk of attorney error") (internal quotation marks omitted).

The same analysis applies here. Absent any constitutional obligation on the part of the federal government to furnish petitioner with appointed counsel during her removal proceedings, any deficiency in her representative's performance cannot be attributed to the government for Fifth Amendment purposes. And, as in *Torna*, the IJ could not be said to have deprived petitioner of her rights under the Due Process Clause by treating her cancellation application as abandoned because it was filed late—particularly when the IJ had previously warned petitioner that an untimely filing would trigger precisely that consequence. See p. 4, *supra*. Rather, an alien in removal proceedings generally "must bear the risk of attorney error" (*Coleman*, 501 U.S. at 753) (internal quotation marks omitted), subject to such exceptions as Congress and the BIA choose to adopt in order to protect aliens from the consequences of substandard performance by counsel or non-attorney representatives in particularly egregious circumstances.

Petitioner argues (Pet. 7-8, 24) that the Attorney General's act of certifying non-attorneys and organizations as qualified to practice in removal proceedings "implicitly guarantee[s] their competence," and that the Attorney General therefore bears a measure of responsibility for the performance of those representatives. The court of appeals correctly rejected that claim, noting that it was unsupported by any authority. See Pet. App. 2. In order to establish a violation of the Due Process Clause, a litigant must show that "the party charged with the deprivation [is] * * * a state actor." *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). The "state action" requirement "avoids imposing on the

[government], its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Id.* at 936.

The government's willingness to allow a particular individual to represent aliens in removal proceedings is not a sufficient basis for imputing that person's conduct to the United States. The attorneys whose allegedly substandard performance was at issue in *Coleman* and *Torna* had presumably been deemed eligible to practice in the relevant state courts, yet this Court nevertheless held that those lawyers' errors could not provide the basis for a constitutional ineffective-assistance claim. Thus, because the United States is under no constitutional obligation to provide appointed counsel in removal proceedings, any errors committed by retained counsel or a non-attorney representative are not fairly attributable to the government. See *Torna*, 455 U.S. at 588 n.4 (explaining that the loss of Torna's right to seek Florida Supreme Court review "was caused by his counsel, and not by the State"). Although arbitrary conduct by an immigration judge or other federal adjudicator might under some circumstances effect a violation of the Due Process Clause, substandard performance by petitioner's representative cannot.

A departure from the principles announced in *Torna* and *Coleman* would be especially unwarranted in the immigration setting. "'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)). Congress has vested the Attorney General with broad discretion to cancel the removal of qualifying permanent residents, while also providing aliens with the opportunity to re-

tain counsel of their choice. See 8 U.S.C. 1158(d)(1) and (4), 1229a(b)(4)(A). The BIA has treated ineffective assistance of counsel as a ground for relief in certain circumstances but has established substantive and procedural requirements for aliens seeking to raise ineffective-assistance claims. Particularly in light of the deference this Court has consistently shown to decisions of the political Branches regarding the admission and removal of aliens, petitioner has no constitutional right to effective representation in removal proceedings.

3. Petitioner's Due Process Clause claim is especially misconceived in the circumstances of this case. Petitioner conceded from the outset that her alien-smuggling offense rendered her removable, and the proceedings before the IJ therefore focused solely on the question whether cancellation of removal was appropriate. See p. 3, *supra*. Because that discretionary decision implicated no constitutionally-protected liberty or property interest of petitioner's, she had no Due Process Clause rights of any sort in those proceedings, let alone a right to the effective assistance of a non-governmental representative.

Apart from any rights conferred by statute or regulation, a removable alien has no procedural or substantive rights relating to the Attorney General's decision whether to exercise discretion in his favor. Compare *Jay* v. *Boyd*, 351 U.S. 345, 358-361 (1956) (applicant has no right of access to confidential information considered by agency in deciding whether to exercise discretion when disclosure would be prejudicial to public interest, safety, or security), and *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 (1957), with *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 266-268 (1954) (ordering the district court to determine

whether the Attorney General had dictated BIA decision concerning discretionary relief, in contravention of governing regulations). Petitioner does not allege a violation of any pertinent statutory or regulatory requirement, and she conceded before the IJ that her alien-smuggling offense rendered her removable. See p. 3, *supra*. The statutory provision (8 U.S.C. 1229b) governing cancellation of removal imposes no substantive or procedural constraints on the "sound discretion of the Attorney General," *Jay*, 351 U.S. at 353, to determine which qualified aliens should be granted that relief.

Petitioner contends (Pet. 5-6) that her request for cancellation implicated both a liberty interest stemming from her desire to avoid removal from this country, and a property interest arising from the fee that she had paid for adjudication of the application and from her wish to continue to receive economic benefits by living and working in the United States. Those arguments are without merit. The fact that a particular government benefit would give the recipient greater freedom of movement or improve her financial condition does not mean that a constitutionally-protected liberty or property interest exists. Rather, the due process inquiry turns on whether applicable provisions of law create an *entitlement* to the benefit if specified conditions are met. See, *e.g.*, *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458, 466 (1981) (holding that inmate had no constitutionally-protected liberty interest in commutation of a prison sentence when applicable state law vested the Board of Pardons with "unfettered discretion"); *Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577 (1972) ("To have a property interest in a benefit, a person clearly must have more than an abstract

need or desire for it. * * * He must, instead, have a legitimate claim of entitlement to it.").

Petitioner also contends (Pet. 1-2, 4-5, 11-19) that the courts of appeals have issued inconsistent pronouncements concerning the applicability of the Fifth Amendment to procedures used to adjudicate claims for discretionary relief from removal. Even assuming that some disuniformity exists in this area, petitioner has no substantial constitutional claim. Any due process right that petitioner might possess in connection with her application for discretionary relief does not include a right to effective representation. See pp. 7-11, *supra*. In any event, the BIA found that petitioner had not established prejudice from any deficiencies in her representative's performance. Because petitioner has not challenged that determination, she would not be entitled to relief even if she could prove the other elements of a Fifth Amendment claim. See pp. 5-7, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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